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OCT 25 1967
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No. 669

Supreme Court of the United States

OCTOBER TERM, 1967

UNITED NATIONAL LIFE INSURANCE COMPANY,
PIONEER LIFE INSURANCE COMPANY and
NATIONAL LIBERTY LIFE INSURANCE COMPANY,
Appellants,

v.

STATE OF CALIFORNIA, *Appellee.*

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF CALIFORNIA

REPLY TO MOTION TO DISMISS

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1. Appellee's motion to dismiss rests essentially on the proposition that this case is controlled by *Ministers Life & Cas. Union* v. *Haase,* 385 U.S. 205. As has been shown in our Jurisdictional Statement, the *Ministers* case involved a controlling factual difference from the

present case. Appellee's only response to this proposition is to claim that the appellant in the *Ministers* case did not stress the factual difference referred to. This circumstance is irrelevant. It is hardly surprising that the appellant in *Ministers* sought to minimize the significance of its use of local "group leaders." The fact of their use was given substantial stress in the opinion of the Wisconsin Supreme Court (see 30 Wis. 2d at 348, 358-59, 141 N.W. 2d at 290, 295), and in the motion to dismiss filed in that case (see *Ministers* Motion, p. 6).

The question whether this Court's decision in *Ministers* is grounded in the facts of that case or represents a summary espousal of a far broader principle must, of course, ultimately be answered by this Court. We suggest that it seems unlikely that this Court intended to overturn a longstanding limitation on state power over the mail order insurance industry by the summary disposition of a case involving facts that brought the case well within the ambit of existing precedents. We also suggest that if the decision in *Ministers* is to be extended to sanction state taxation and regulation solely on the basis of an insurance company's use of the interstate mails, the extension deserves plenary consideration by this Court.

2. Contrary to the statement in the motion to dismiss (p. 4), appellants do not contend that *Ministers* conflicts with or has been overturned by the more recent decision in *National Bellas Hess* v. *Dept. of Revenue,* 386 U.S. 753. On the contrary, it is only when *Ministers* is read as appellee would read it that an apparent conflict with *National Bellas Hess* appears. We submit that *Ministers* and *National Bellas*

Hess—along with the numerous other decisions cited in the Jurisdictional Statement—point to a single conclusion: that the controlling test, disregarded by the California Supreme Court, is whether agents or representatives are present in the jurisdiction that seeks to tax and regulate.

Appellee's suggestion that *National Bellas Hess* is irrelevant because it allegedly involved a question of taxation whereas California's statutory regime is primarily one of regulation finds no support in the authorities. Two of the precedents that Congress made controlling in adopting the McCarran-Ferguson Act—*Allgeyer* v. *Louisiana,* 165 U.S. 578, and *St. Louis Cotton Compress Co.* v. *Arkansas,* 260 U.S. 346—treat the respective state statutes in those cases as governed by identical legal principles although one involved regulation and the other a tax, and the House Report on the McCarran-Ferguson Act refers to taxation and regulation without any suggestion of differentiation between them.[1]

Appellee's argument based on isolated sentences from *Hood & Sons* v. *Du Mond,* 336 U.S. 525, and *Breard* v. *Alexandria,* 341 U.S. 622, falls when the passages quoted are read in context. The Court in those cases was distinguishing not between taxation and regulation but between state action that discriminates against or prohibits interstate commerce and that directed to a less invidious end. Both cases involved regulation of business operations carried on by agents within the state. Hence, unlike the present case, the requisite jurisdictional nexus for state regulation plainly existed

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[1] H.R. Rep. No. 143, 79th Cong., 1st Sess. 3, quoted in Jurisdictional Statement, p. 11, n. 12.

in each instance and the only question was whether the discriminatory impact of the regulation on interstate commerce invalidated the regulatory scheme.

Even if the tax-regulation distinction pressed by appellee were accepted, it would be of no help to appellee here. For on the one hand, the statute struck down in *National Bellas Hess* did not purport to tax the appellant in that case, but rather to regulate it by compelling it to collect a tax from others — admittedly subject to the state's jurisdiction—on behalf of the state. And on the other, there is concededly here at issue California's authority to tax appellants as well as its authority to regulate them.

3. Finally, appellee attempts to support its contention that a state has plenary power to tax and to regulate mail order insurance companies that have no agents, representatives, offices or property within the state but conduct their business solely through the mails by reference to two decisions of this Court which have no real relevance to the issue here presented. The case principally relied on, *Robertson* v. *California*, 328 U.S. 440, was not even referred to by the California Supreme Court, and for good reason. *Robertson* upheld the validity of two California statutes requiring that insurance agents operating within the state obtain licenses from the Insurance Commissioner and abstain from representing unauthorized insurers. Appellee seeks to bring the decision to bear on the instant case by suggesting that its underlying rationale is "that the agent is subject to regulation because the foreign insurer itself is subject to regulation" (p. 6).

A reading of the *Robertson* opinion makes evident that appellee's suggestion is without foundation. The case does not hold that a local insurance agent is subject to state regulation because his foreign principal is subject to such regulation. The language relied upon by appellee was used by the Court in rejecting the argument that a local agent was immune from state regulation because the regulation of his foreign principal would be beyond state power—an argument that ignored the fact that this Court has consistently held a foreign principal with local agents to be subject to the power of the state.

To the extent that the language in *Robertson* has any relevancy here it indicates merely that a foreign insurer which chooses to enter a state by employing agents there subjects itself to the regulatory jurisdiction of the state. Were *Robertson* in fact based on any theory like that pressed by appellee the case would necessarily have required discussion in *State Bd. of Ins.* v. *Todd Shipyards Corp.*, 370 U.S. 451, and indeed would appear to have compelled a contrary result in that case. As in the case of *Ministers,* appellee seeks to gain support from the *Robertson* decision by adding new theories and subtracting limiting facts.

The other case referred to by appellee, *Fairfax Family Fund, Inc.* v. *California,* 382 U.S. 1, is not in point because it involved state power to regulate a loan company, not an insurance company. That power is unconstrained by the McCarran-Ferguson Act and thus is not governed by constitutional principles as they had been enunciated in 1945 but rather by the more expansive standards of today.

The motion to dismiss should be denied and probable jurisdiction noted.

Respectfully submitted,

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